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CENTRAL FAX CENTER****JUN 27 2006****PATENT****IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of:	Andrew Bicek, Tim Girton
Application No.:	10/058640
Filed:	January 30, 2002
For:	STENT WITH WISHBONE CONNECTORS AND SERPENTINE BANDS
Examiner:	Kamrin R. Landrem
Group Art Unit:	3738

Mail Stop Appeal Brief-Patents

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Docket No.: S63.2-10015-US01**FACSIMILE TRANSMITTAL LETTER****TO: Examiner Kamrin R. Landrem****FACSIMILE NO.: 571-273-8300****GROUP ART UNIT:****TOTAL NUMBER OF PAGES (including cover letter):** 18**DATE: June 27, 2006****TIME: 2:48 pm**

Following please find a **17 page Reply Brief** in addition to this 1 page Facsimile Transmittal Letter.

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Respectfully Submitted,

VIDAS, ARRETT & STEINKRAUS, P.A.

Date: June 27, 2006

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CENTRAL FAX CENTER****JUN 27 2006****PATENT****IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

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Docket No.: S63.2-10015-US01**REPLY BRIEF**

This Reply Brief is in response to the Examiner's Answer dated May 2, 2006.

In the event that this response requires the payment of government fees and payment is not enclosed, the Commissioner is authorized to charge Deposit Account No. 22-0350 for any other fees which may be due.

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(i) Real Party in Interest

The application is assigned to Boston Scientific Scimed, Inc., formerly known as Scimed Life Systems, Inc., One SciMed Place, Maple Grove, MN 55311-1566, a Minnesota Corporation and a subsidiary of Boston Scientific Corporation, One Boston Scientific Place, Natick, Massachusetts, 01760-1537, a Delaware Corporation.

(ii) Related Appeals and Interferences

None.

(iii) Status of Claims

Claims 6 and 15 have been canceled. Claims 3, 7, 12 and 16, have been withdrawn. Claims 1, 2, 4, 5, 8-11, 13, 14, and 17-22 are pending in the application and have been finally rejected and are the subject of this appeal.

(iv) Status of Amendments

Subsequent to the Final Office Action of September 10, 2004, a Response After Final and Request for Reconsideration was filed on December 1, 2004. In the Response After Final no amendments were made to the claims.

(v) Summary of Claimed Subject Matter

A summary of representative independent claims, as well as those dependent claims to which separate arguments are being presented, as required by 37 C.F.R. §41.37(c)(1)(v), and a non-limiting listing of locations where support may be found [bracketed citations] is provided as follows:

Claim 1 is directed to a stent having a proximal end and a distal end, wherein the stent comprises a plurality of axially spaced serpentine bands and a plurality of wishbone connectors [page 2, lines 1-7]. Each serpentine band has a proximal and distal end and consists of a plurality of interconnected struts [page 2, lines 2-4]. The struts are of substantially the same length [page 2, lines 4]. Serpentine bands which are adjacent one another are connected one to

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the other [page 2, lines 4-5].

Each wishbone connector connects two serpentine bands which are adjacent one another and has an elongate portion which is disposed between the two serpentine bands and does not overlap longitudinally with either of the two serpentine bands [page 2, lines 5-9]. The proximal end of the elongate portion has two legs extending therefrom to one of the two serpentine bands and the distal end of the elongate portion has two legs extending therefrom to the other of the two serpentine bands [page 2, lines 10-12]. The two legs extending from the proximal end of the elongate portion of each wishbone connector are circumferentially and longitudinally displaced from the two legs extending from the distal end of the elongate portion of the wishbone connector [page 2, lines 23-26].

At least one wishbone connector connects serpentine bands which are adjacent one another [page 2, lines 12-13].

Claim 8 is directed to the stent described in claim 1 wherein each serpentine band comprises alternating peaks and troughs, wherein the number of peaks in the stent are twice the number of wishbone connectors [page 2, lines 15-16].

Claim 9 is directed to the stent described in claim 1 wherein the width of the serpentine bands exceeds the width of the wishbone connectors [page 2, lines 30-31].

Claim 10 is directed to a stent having a first proximal end and a distal end, wherein the stent comprises a plurality of axially spaced serpentine bands and a plurality of wishbone connectors [page 2, lines 32; through page 3, line 5]. Each serpentine band has a proximal end and a distal end, and a plurality of peaks and troughs, wherein all of the peaks are longitudinally aligned with one another and all of the troughs are longitudinally aligned with one another [page 3, lines 1-3]. Serpentine bands which are adjacent one another are connected one to the other [page 3, lines 3-4].

Each wishbone connector connects two serpentine bands which are adjacent one another and has an elongate portion which is disposed between the two serpentine bands and does not overlap longitudinally with either of the two serpentine bands [page 3, lines 5-8]. The proximal end of the elongate portion has two legs extending therefrom to one of the two serpentine bands, and the distal end of the elongate portion has two legs extending therefrom to the other of the two serpentine bands [page 3, lines 8-10]. The two legs extending from the

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proximal end of the elongate portion of each wishbone connector are circumferentially and longitudinally displaced from the two legs extending from the distal end of the elongate portion of the wishbone connector [page 3, lines 21-24].

At least one wishbone connector connects serpentine bands which are adjacent one another [page 3, lines 11-12].

Claim 17 is directed to the stent described in claim 10 wherein each serpentine band comprises alternating peaks and troughs and the number of peaks in the stent being twice the number of wishbone connectors [page 3, lines 13-15].

Claim 18 is directed to a stent comprising a plurality of first and second alternating serpentine bands, wherein the first serpentine bands are of one geometry and the second serpentine bands are of a geometry different than the first serpentine bands [page 3, lines 28-31]. Each of the first and second serpentine bands has a proximal end and a distal end [page 3, lines 31]. Each second serpentine band is connected to one proximally adjacent first serpentine band via a plurality of first connectors and to one distally adjacent first serpentine band via a plurality of second connectors [page 3, lines 32 through page 4, line 1].

Each second serpentine band is characterized by a repeating pattern of two or more consecutive first connectors extending distally from the second serpentine band followed by two or more second connectors extending proximally from the second serpentine band [page 4, lines 1-4]. The two or more first connectors are circumferentially and longitudinally offset from the two or more second connectors [see figure 5].

(vi) Grounds of Rejection to be Reviewed on Appeal

I. Whether the Examiner erred in rejecting claims 1, 2, 4, 5, 10, 11, 13 and 14 under 35 U.S.C. § 102(b), as being anticipated by U.S. 5,935,162 to Dang (hereinafter: Dang).

II. Whether the Examiner erred in rejecting claims 8, 9, and 17 under 35 U.S.C. §103(a) as being obvious over Dang in view of U.S. 6,019,789 to Dinh et al (hereinafter: Dinh).

III. Whether the Examiner erred in rejecting claims 18-22 under 35 U.S.C. §103(a) as being obvious over Dinh in view of Dang.

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(vii) **Response to Examiner's Arguments**

I. The Examiner erred in rejecting claims 1, 2, 4, 5, 10, 11, 13 and 14 under 35 U.S.C. § 102(b), as being anticipated by Dang.

In the Examiner's Answer, the Examiner asserted that the phrase "consisting of" in claim 1 of the instant application does not require that the serpentine bands be made up of only a plurality of interconnected struts of substantially the same length. The Applicants disagree.

Also, in the Examiner's Answer, the Examiner continued to assert that Dang includes wishbone connectors with an elongate portion that does not overlap longitudinally with either of the two serpentine bands. The Applicants disagree.

Regarding Independent Claim 1 and Those Claims Dependent Therefrom

In the Examiner's Answer, the Examiner asserts that because the closed phrase "consisting of" appears in the body of claim 1, after the open-ended transitional phrase "comprising" was used in the preamble, the desired effect of the phrase "consisting of" to close the element of a "plurality of interconnected struts" is negated. In other words, the Examiner argues that the open-ended transitional phrase "comprising" precludes an applicant from thereafter limiting any element in the body of the claim by way of the closed phrase "consisting of." The Examiner goes on to state that the "applicant is giving to [sic] much weight to the use of the word consisting." The Examiner is wrong for two reasons.

First, any attempt to minimize the importance of claim language is erroneous. As Professor Chisum states, the Supreme Court has "consistently stated that the primary purpose of claim language is to give fair warning to persons in the art of what will constitute infringement." Chisum on Patents, Vol. 3, § 8.03[3], pg. 32. Further, as previously asserted in Applicants' Appeal Brief, the phrase "consisting of" is a term of art recognized in the practice of claim drafting that is used cautiously, and deliberately, by patent practitioners. It is only through the precise use of phrases such as "consisting of" that patent practitioners are able to give fair warning to the public of exactly what is claimed.

Second, the Federal Circuit, in *Mannesmann Demag Corp. v. Engineered Metal Products Co., Inc.* 793 F.2d 1279, 230 USPQ 45 (Fed. Cir. 1986), addressed the issue and held

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that when the phrase “‘consisting’ of appears in one clause of the patent, rather than in the preamble, it limits only the element set forth in the clause; the phrase does not exclude all other elements from the claim as a whole.” Chisum on Patents, Vol. 3, 8.06[1][b][ii], pg. 189. Furthermore, based on the *Mannesmann* ruling, a district court has held that “an applicant can leave the claim open with respect to additional elements, but can close the claim with respect to a particular element.” *Berenter v. Quigg*, 14 USPQ2d 1175, 1176 (D.D.C. 1988). Clearly, that is the situation presented in claim 1 of the present application:

A stent having a proximal end and a distal end, **the stent comprising:**
a plurality of axially spaced serpentine bands, each serpentine band having a proximal and distal end **and consisting of a plurality of interconnected struts**, the struts of substantially the same length, serpentine bands which are adjacent one another connected one to the other; and
a plurality of wishbone connectors, each wishbone connector connecting two serpentine bands which are adjacent one another and having an elongate portion which is disposed between the two serpentine bands and does not overlap longitudinally with either of the two serpentine bands, the elongate portion having a proximal end and a distal end, the proximal end having two legs extending therefrom to one of the two serpentine bands and the distal end having two legs extending therefrom to the other of the two serpentine bands, the two legs extending from the proximal end of the elongate portion of each wishbone connector being circumferentially and longitudinally displaced from the two legs extending from the distal end of the elongate portion of the wishbone connector,
at least one wishbone connector connecting serpentine bands which are adjacent one another.

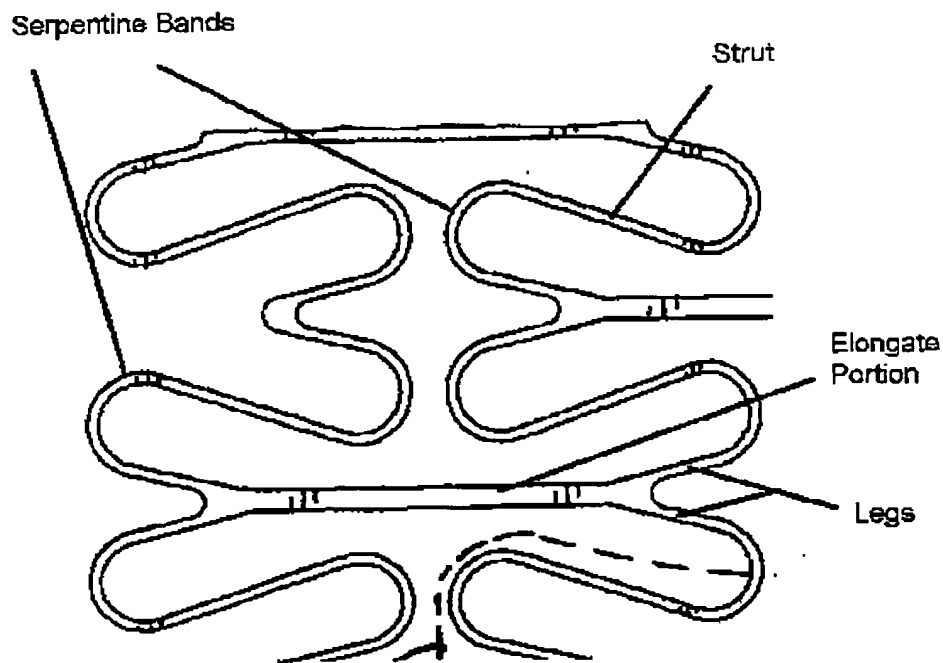
The preamble of claim 1 of the instant application uses the inclusive transitional phrase “the stent comprising” to leave the claim open to additional elements, while closing one of the elements of the claim by use of the phrase “consisting of a plurality of interconnected struts,” in accordance with *Mannesmann*. Thus, rather than being “not convincing,” as the Examiner erroneously asserted, Applicants’ argument that the serpentine bands are made of only a plurality of interconnected struts of substantially the same length is conclusive.

As a result, as argued in Applicants’ appeal brief, U.S. Patent No. 5,935,162 (“Dang”) does not teach or suggest all of the elements of instant claim 1. Specifically, FIG. 2 of Dang shows bands that consist not only of struts of substantially the same length, but the additional features of the “legs” of each wishbone connector, which are required to interconnect

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the struts to form a given band. In the Final Office Action, the Examiner provided an interpretation of FIG. 2 of Dang wherein each band was shown having struts of substantially the same length. A portion of FIG. 2 of Dang is provided below:



Because the bands of Dang include legs, along with a plurality of interconnected struts, the bands of Dang cannot be said to "consist of" a plurality of interconnected struts, as required by instant claim 1. Consequently, Dang does not disclose a stent with all the elements of claim 1.

In the Examiner's Answer, the Examiner also asserted that Dang disclosed another claimed feature of claim 1, namely of "a plurality of wishbone connectors, each wishbone connector connecting two serpentine bands which are adjacent one another and having an elongate portion which is disposed between the two serpentine bands and does not overlap longitudinally with either of the two serpentine bands..." The Examiner argued that each figure of Dang showed this feature, defined "overlap" to mean "to cover a part of," citing Webster's Online Dictionary, and asserted that "[t]here are no components disclosed by Dang that are covered by another part." Applicants disagree with the Examiner's use of extrinsic evidence, and

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even if the use of extrinsic evidence is appropriate, Applicants disagree with the Examiner's arbitrary choice of definitions for the term "overlap".

Nowhere in the application do the Applicants define "overlap," as used in claim 1, to mean "to cover a part of," as suggested by the Examiner. To consult an extrinsic source of evidence, like a dictionary, before looking at the meaning of the claim term as used within the context of the patent application, is in contravention of *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005). The *Phillips* court, in holding that the specification should be consulted prior to looking at extrinsic sources, stated that consulting extrinsic sources, like dictionaries, first "place[s] too much reliance on extrinsic sources...and too little on intrinsic sources, in particular the specification and prosecution history." *Id.*

In construing the term "overlap," it is important to remember that, as the *Phillips* court said, "patents are addressed to and intended to be read by others of skill in the pertinent art." *Id.* Additionally,

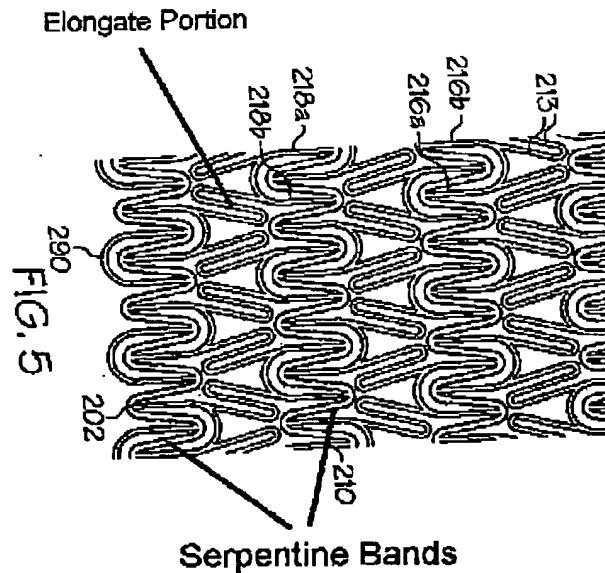
Such person is deemed to read the words used in the patent documents with an understanding of their meaning in the field, and to have knowledge of any special meaning and usage in the field. The inventor's words that are used to describe the invention—the inventor's lexicography—must be understood and interpreted by the court as they would be understood and interpreted by a person in that field of technology.

Id., citing *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1477 (Fed. Cir. 1998). One of ordinary skill in the stent art would not read the claim term "overlap" to mean "to cover a part of," as argued by the Examiner. One of ordinary skill in the art would not attach the Examiner's meaning to the claim term "overlap" because it is understood that strut components, generally, would not cover each other, thus the use of the term would be superfluous. Therefore, one of ordinary skill in the art would recognize that "overlap" must mean something other than "to cover a part of."

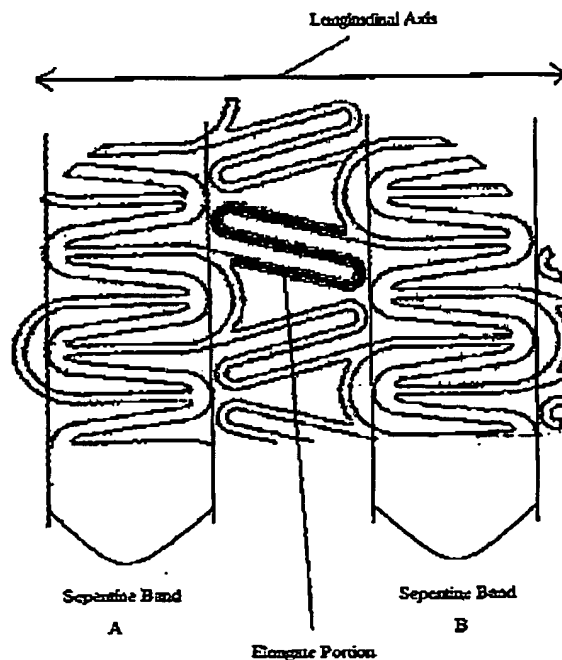
Within the context of the instant application, FIG. 5 (reproduced below) illustrates that each serpentine band is comprised of alternating peaks 202 and troughs.

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Further, as shown below in the detailed view of FIG. 5, as presented in the application as originally filed, successive peaks of each serpentine band define a plane that runs perpendicular to the longitudinal axis of the stent:



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Similarly, successive troughs of each serpentine band also define a plane that runs perpendicular to the longitudinal axis of the stent. These two planes, taken together, form the area of a serpentine band.

As shown above in the detailed view of FIG. 5, the elongate portions do not extend longitudinally so far as to occupy the area of either Serpentine Band A or Serpentine Band B. That is, the elongate portion disposed between Serpentine Band A and Serpentine Band B does not overlap with either.

Referring now to Dang, based on Applicants interpretation of the meaning of the claim term "overlap," the elongate portions disposed between adjacent serpentine bands clearly overlap with the adjacent serpentine bands, as shown below in FIG. 2 of Dang:

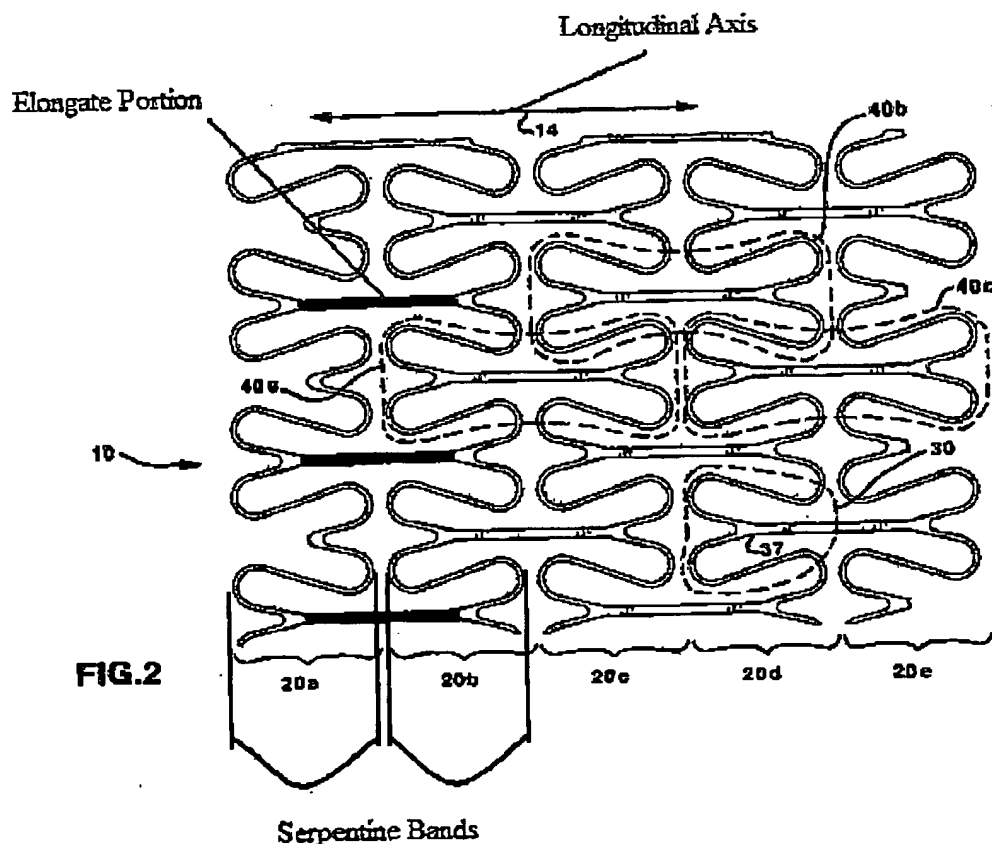


FIG. 2 of Dang clearly shows that the elongate portions extend longitudinally so far as to occupy the area of serpentine bands 20a and 20b. In other words, the elongate portion does overlap the

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serpentine bands, in contrast to the recitation of the instant claims. Therefore, because Dang fails to teach or suggest all of the elements of instant claim 1, Dang does not anticipate claim 1.

However, even if extrinsic evidence is consulted to construe the claim term "overlap," Webster's Online Dictionary, the same source relied on by the Examiner, provides a definition that conforms with the Applicants consistent and repeated usage. Specifically, "overlap" is defined as "to occupy the same area in part." As Applicants argued above, the elongate portions of the instant application do not occupy the area of adjacent serpentine bands. Thus, if extrinsic evidence is required to resolve an ambiguity, Applicants dictionary definition choice conforms to the claim term "overlap" as presented in the instant application, while Examiner's arbitrary choice of definitions does not.

Therefore, in light of the arguments presented above, Applicants have successfully traversed the Examiner's rejections and claims 1, 2, 4, 5, 10, 11, 13 and 14 should be allowed.

Regarding Independent Claim 10 and Those Claims Dependent Therefrom

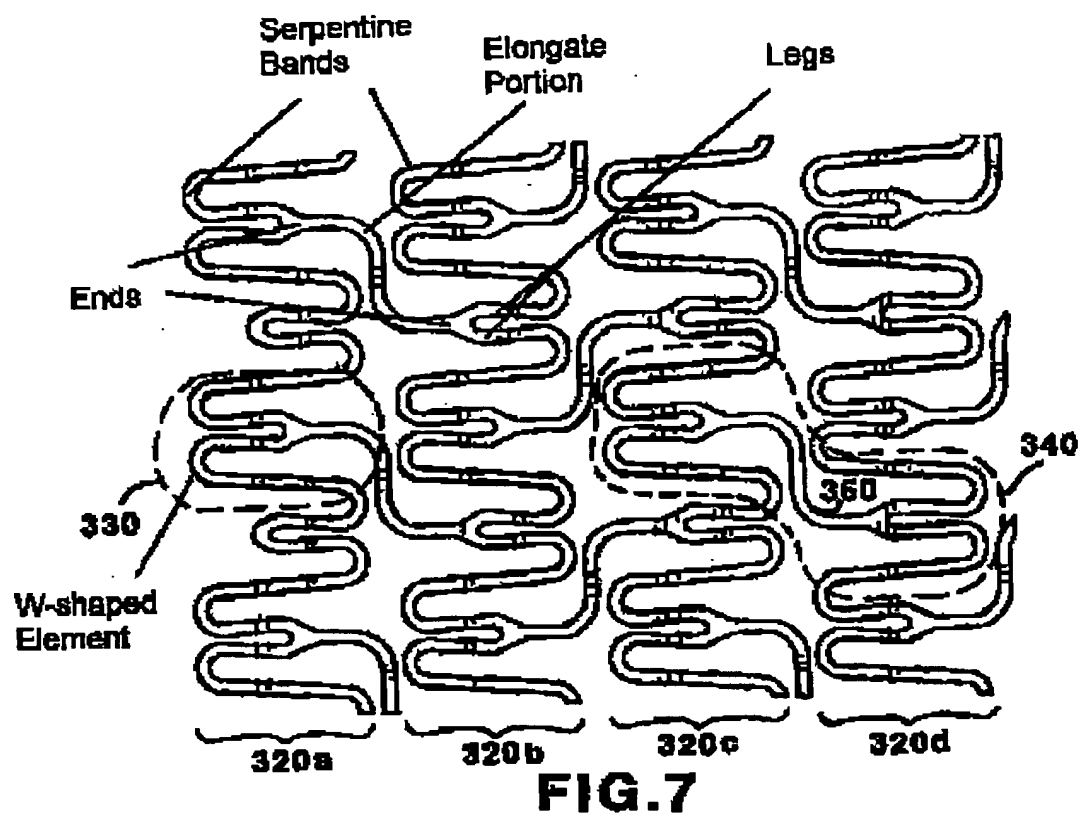
Turning now to instant claim 10, and those claims depending therefrom, as previously argued in the Applicants' Appeal Brief instant claim 10 also describes a stent having a plurality of wishbone connectors, wherein the elongate portion of a connector, which is disposed between two serpentine bands, wherein the elongate portion *does not overlap longitudinally* with either of the two serpentine bands. As discussed above, in the stent of Dang each of the bands connected by a wishbone connector longitudinally overlap the elongate portion of the connector in contrast to the recitation of the instant claims.

Instant claim 10 also describes that the two legs extending from the proximal end of the elongate portion are *circumferentially and longitudinally* displaced from the two legs extending from the distal end of the elongate portion. As discussed above, Dang fails to disclose such a relationship between the legs at the opposing ends of the elongate connectors.

In the Advisory Action, the Examiner points to FIG. 7 of Dang as teaching "legs of the elongate portion that are circumferentially and longitudinally offset". Applicants respectfully assert that nowhere in Dang, including FIG. 7, is such a feature shown, described or otherwise disclosed. An annotated copy of FIG. 7 of Dang is reprinted below:

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In FIG. 7 of Dang, the stent shown therein is said to include cylindrical sections (320a-d, see column 8, lines 2-12). As cylindrical sections, these structures form a continuous "perimeter or circumference" (*Id* at lines 10-11). In the interpretation presented in the Final Office Action, such structures are apparently being considered by the Examiner to be the "plurality of axially spaced serpentine bands" as instant claim 10 recites. If such an interpretation is made, then it is clear that the "W-shaped elements" 330 must be part of a given band. As part of the band, these elements cannot be considered to be portions of a connector (i.e. "two legs" as recited in instant claim 10) that connects the serpentine band...since the elements are actually the band itself as shown above. If, on the other hand the elements 330 or merely portions thereof, are considered to be extraneous or separate from the band, then the band ceases to exist and is replaced by a series of disconnected elements separated by portions of element 330.

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Thus, if Dang is interpreted to have serpentine bands, Dang cannot also be selective viewed to have wishbone connectors having all of the features required by the instant claims. On the other hand, if the middle region of elements 330 are interpreted to be two legs of a wishbone connector, then Dang cannot be said to have the recited feature of serpentine bands.

In light of the failure of Dang to teach or suggest all of the elements of instant claim 10 Applicants respectfully request that the §102 rejection to claim 10, and those claims dependent therefrom, be withdrawn.

II. The Examiner erred in rejecting claims 8, 9 and 17 under 35 U.S.C. §103(a) as being obvious over Dang in view of Dinh.

Applicants disagree with the assertion set forth by the Examiner that the instant claims are obvious over Dang in view of Dinh.

As presented in the Applicants' previously filed Appeal Brief, in the Final Office Action, Dinh was cited as providing the stated peak to wishbone ratio of instant claims 8 and 17 as well as the provision of bands having a width which exceeds the width of the wishbone connectors, as described in instant claim 9.

The proposed inclusion of the selected elements of Dinh however, does nothing to address the failure of Dang to teach or suggest all of the elements of the instant claims. As discussed above, Dang does not teach or suggest a wishbone connector wherein the two legs extending from the proximal end of the elongate portion are *circumferentially and longitudinally* displaced from the two legs extending from the distal end of the elongate portion, and wherein the elongate portion of a connector, which is disposed between two serpentine bands *does not overlap longitudinally* with either of the two serpentine bands. Dinh also fails to teach or suggest a stent having such features. Thus, even if some motivation can be found to combine the references in the manner proposed in the Final Office Action, such a combination does not address the failure of Dang alone to teach or suggest all of the elements of the instant claims.

In light of the above Applicants respectfully request that the §103 rejection to claims 8, 9, 17 be withdrawn.

III. The Examiner erred in rejecting claims 18-22 under 35 U.S.C. §103(a) as being

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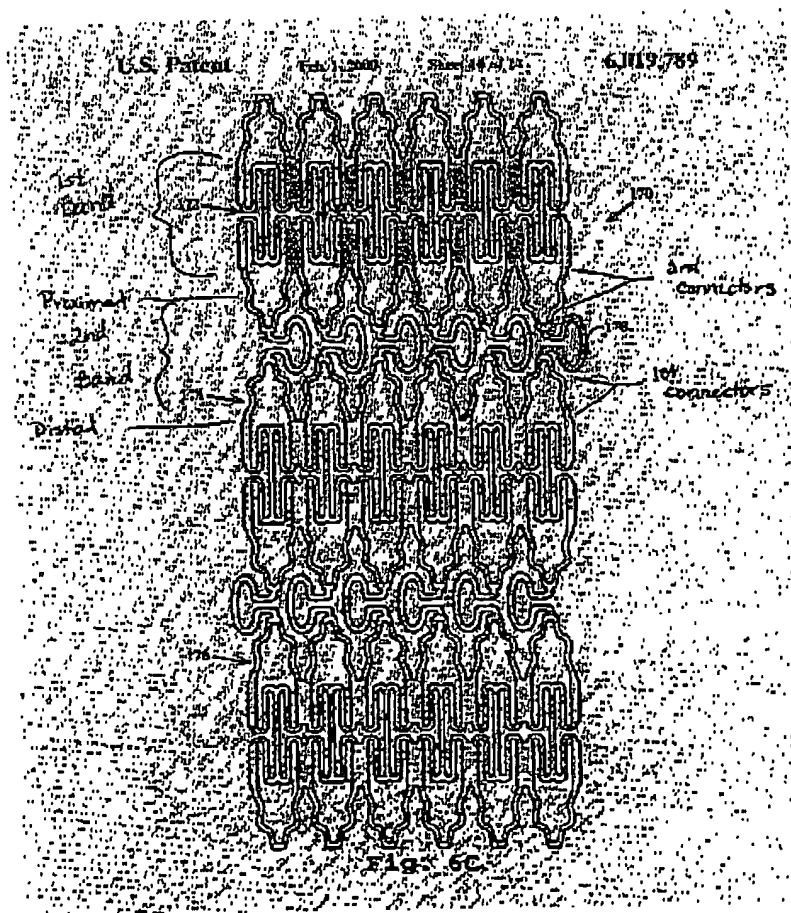
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obvious over Dinh in view of Dang.

Applicants disagree with the assertion set forth by the Examiner that the instant claims are obvious over Dinh in view of Dang.

As Applicants set forth in their previously presented Appeal Brief, in the Final Office Action the Examiner asserts that Dinh discloses a stent having all of the features of the instant claims, but fails to disclose that the two or more first connectors are circumferentially and longitudinally offset from the two or more second connectors. FIG. 7 of Dang is cited as teaching a stent having connectors, which have ends that are circumferentially and longitudinally offset in order to provide the stent with longitudinal flexibility.

In comparing the features of Dinh to those recited in instant claim 18 the Examiner provided an annotated copy of FIG. 6C of Dinh, which is reprinted herewith:



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According to the Examiner's interpretation, as set forth in the Final Office Action, FIG. 6C of Dinh, as presented above, shows the recited claim limitation of first and second serpentine bands having different geometries by the presence of band 172 and 178 as marked.

Applicants respectfully assert however, that the "serpentine bands" identified by the Examiner are neither "serpentine" nor are they "bands" as instant claim 18 describes. "Band" 178 for example, is described by Dinh as a "connecting segment" having a "large loop" configuration (column 7, lines 21-27). Nothing in Dinh or the cited art provide a basis for interpreting segment 178 to function as, or be a part of, a "serpentine band" as the instant claims describe. It is unclear, even in light of the Examiner's markings and notations, how the connecting segment 178 of Dinh could be considered to have a serpentine configuration let alone be part of a serpentine band. The Examiner's own highlighting on the marked copy of FIG. 6C appears to suggest that "band" 178 is actually a series of *discontinuous* structures that have no connectivity and thus do not form a band as described.

Though the elements 178 of Dinh are not serpentine bands as the present claims require, it is certainly recognized that the stent of Dinh does have different portions which may be described as bands of different geometries. Even when such bands are considered however, it is clear that, such bands are not arranged, or connected in the manner recited in the instant claims.

The proposed addition of the circumferentially and longitudinally offset "connectors" of FIG. 7 of Dang (see discussion and figure provided above) does nothing to address the failure of Dinh to teach or suggest all of the elements of the instant claims. Assuming *arguendo* that motivation exists to combine the connectors shown in Dang with the stent of Dinh, it still remains unclear under their individual or combined teaching, how or in what manner the connectors would provide the stent of Dinh with second serpentine bands that are characterized by a repeating pattern of two or more consecutive first connectors that extend distally from the second serpentine band followed by two or more second connectors that extend proximally from the second serpentine band, wherein the two or more first connectors are circumferentially and longitudinally offset from the two or more second connectors.

Without some additional suggestion and/or teaching in the cited references or the art as a whole, there is nothing in the references which would suggest that merely inserting into

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the structure of Dinh connectors with circumferentially and longitudinally offset ends, as the Examiner proposes, will provide the Dinh stent with second serpentine bands that are provided with two or more first connectors, that are circumferentially and longitudinally offset from two or more second connectors as instant claim 18 describes.

Nowhere in the cited art is such a configuration taught or suggested. In light of this utter lack of disclosure in the cited references, it is clear that it is only when the references are viewed through the lens of hindsight that any motivation to combine the references becomes apparent. The use of such hindsight in attempting to establish a §103 obviousness rejection is impermissible (see also *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 USPQ 303, 313 (Fed. Cir. 1983)).

Because the proposed combination of Dinh and Dang fail to teach or suggest all of the elements of instant claim 18, and those claims which depend therefrom, Applicants respectfully request withdrawal of the §103 rejection to claims 18-22.

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CONCLUSION

For at least the reasons discussed above claims 1, 2, 4, 5, 8-11, 13, 14, and 17-22 are patentably distinct over the cited art. Consequently, reversal of the rejections is respectfully requested.

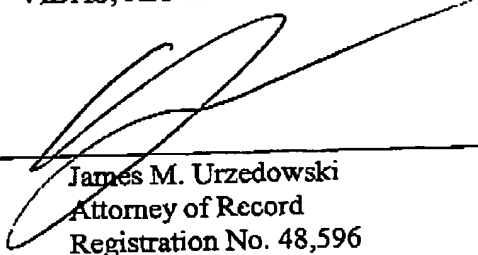
Respectfully submitted,

VIDAS, ARRETT & STEINKRAUS, P.A.

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6/27/06

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